

6 Official Opinion of the Compliance Board 41 (2008)

NOTICE REQUIREMENTS – METHOD – RELIANCE ON INTERNET WEBSITE – 2007 LEGISLATION DID NOT ALTER PRACTICE FOR PUBLIC BODIES THAT TRADITIONALLY RELIED ON WEBSITE

August 11, 2008

Michele J. Fluss

The Open Meetings Compliance Board has considered your complaint that the State Water Quality Advisory Committee (“SWQAC”) violated the Open Meetings Act in connection with several past meetings, and will likely violate the Act in connection with future meetings, as a result of the Committee’s failure to give proper notice in accordance with the Act. The complaint requires that we evaluate a practice under which notice of SWQAC meetings was provided through three Internet sources: the Maryland Department of the Environment (“MDE”) website, the Department of Natural Resources (“DNR”) website, and the SWQAC website; however, the posting of notices and level of detail varied. We have taken the liberty of reordering the issues raised in your complaint for purposes of our analysis. For the reasons explained below, we find no violation.

I

Complaint & Response; Supplemental Record

A. Complaint

The complaint alleged that SWQAC failed to satisfy the notice requirements of the Open Meetings Act in advance of its meeting on February 1, 2008, in that, “notice was not given ... at SWQAC’s customary place of posting notice - - MDE Internet web site Calendar of Events.” As to an April 4, 2008, session held in Frostburg, the complaint alleged that the notice posted on MDE’s Calendar of Events was legally deficient in that it failed to provide the time of the meeting or specific location.

The complaint further alleged that SWQAC has violated the Act by providing notice for a series of meetings, and will continue to violate the Act in connection with identified future meetings,¹ by posting notice on an Internet website because

¹ SWQAC meetings dates identified in this portion of the complaint were August 3, October 5, and December 7, 2007, and April 4, June 6, August 1, October 3, and December 5, 2008.

SWQAC has never given public notice that this method of providing notice of its meetings would be used. Focusing on Chapter 643, Laws of Maryland 2007, the legislation that added the use of an Internet website as one method of giving notice, and language in the legislation's fiscal and policy note, the complaint argued that prior use of a website before the legislation's effective date does not excuse a public body from satisfying the public notice prerequisite found in the introductory language of § 10-506(c)(3).² The complaint also alleged that responsibility for giving notice that a website will be used lies with SWQAC and another unit of government cannot satisfy this obligation on its behalf. The complaint further alleged that a public body must maintain a copy of the public notice indicating that a website will be employed in providing meeting notices in accordance with § 10-506(d).

Because of the alleged notice violations, the complaint also alleged that the meetings were not truly open and that public was denied the opportunity to attend, resulting in violations of §§ 10-505 and 10-507(a).

B. Response

In a timely response on behalf of SWQAC, Assistant Attorney General Nancy Young reviewed the notice provisions of the Open Meetings Act and the various methods in which notice of SWQAC meetings generally has been given. As to the February 1, 2008, meeting, the response noted that the DNR website informed the public that SWQAC meetings occur on the first Friday of every even month at MDE. Notice was also provided on SWQAC's website which indicated that the meeting would occur at MDE on February 1, 2008, at 9:30 a.m.

As for the April 4, 2008, meeting, the response acknowledged that MDE did not include the time of the meeting, but did indicate that the meeting would occur at the Frostburg Field Office and provided the name of a contact person, along with an e-mail address, for those seeking more information. However, SWQAC's website provided the information required under the Act, indicating that the meeting would occur at 10:30 a.m., and providing directions to the Frostburg Field Office location. The response also indicated that DNR's website provided a hyperlink to SWQAC's website.

The response noted that, in addition to the listed options, the Open Meetings Act provides that notice of a meeting may be satisfied by any "reasonable method" and argued that the combined website postings meet this standard and were as effective a means of giving notice as reliance on the *Maryland Register* or a classified ad in the *Baltimore Sun*. The response also reviewed the development of

² All statutory references are to the Open Meetings Act, Title 10, Subtitle 5, of the State Government Article, Annotated Code of Maryland.

SWQAC's own website and outreach efforts and outlined additional efforts SWQAC will undertake to enhance access to information about SWQAC's activities. Citing 4 *OMCB Opinions* 178, 180 (2005), the response noted that the Compliance Board has already recognized that SWQAC reliance on the MDE website as a vehicle for providing meeting notices was a "reasonable method" under the Act.

While the SWQAC questioned the utility of publishing in the *Maryland Register* or *Baltimore Sun* a one-time announcement that the SWQAC website will be used in announcing meetings, it has agreed to publish such notice "in an effort to accommodate all concerns."

C. Supplemental Record

Following our receipt of SWQAC's response, you submitted a supplemental memorandum in which you took issue with the manner that SWQAC addressed the allegations in your initial complaint. Specifically, in connection with the February 1 meeting, you emphasized that the complaint focused on the fact that notice was not provided at "SWQAC's customary place of providing notice - - the MDE Calendar of Events." You also disputed the suggestion that the Compliance Board's December 2, 2005 opinion "provide[d] reasonable 'notice' to the public that meetings will be posted on the MDE calendar" In connection with other meetings, you stressed that your complaint focused on the failure of SWQAC to announce that any website would be employed to give notice of its meetings. Furthermore, you alleged that information on other agency websites cannot cure the failure of SWQAC to provide notice of the method in which meeting notices would be provided. Finally, the supplemental memorandum faulted the SWQAC for failure to provide to the Compliance Board a copy of any notice indicating that meeting notices would be posted on a website or copies of specified meeting notices that had appeared on the SWQAC's website.³

On receipt of your supplemental memorandum, we offered SWQAC an opportunity to respond. SWQCA acknowledged that MDE has been unable to locate a copy of the notice for the February 1 meeting; however, in SWQAC's view, other notices posted in advance of the meeting were sufficient to satisfy the Act. Furthermore, the response took issue with the suggestion that prior meeting notices on websites were invalid or otherwise failed to satisfy the Act. According to the supplemental response, for 2½ years the public has relied on the Internet for tracking SWQAC meetings. The Act does not require renotification. Furthermore, MDE

³ The supplemental memorandum also included certain legislative recommendations for the Compliance Board's consideration, issues that will be considered outside the context of this opinion.

now provides a link to the SWQAC's website. The supplemental response also addressed SWQAC's public outreach efforts.

II

Notice via Website

The gravamen of the complaint questions the validity of public meeting notices posted on websites, absent some affirmative action on SWQAC's part, intended to alert the public that this method of providing notice would be used.

The Open Meetings Act requires a public body to provide reasonable notice in advance of a meeting governed by the Act. § 10-506(a). A notice only satisfies the requirement of the Act if those interested have been made aware of where to look. 4 *OMCB Opinions* 88, 98 (2004). However, in terms of *how* a public body provides notice, the Act allows public bodies such as the SWQAC considerable flexibility:

A public body may give the notice under [§ 10-506] as follows:

- (1) if the public body is a unit of the State government, by publication in the Maryland Register;
- (2) by delivery to representatives of the news media who regularly report on sessions of the public body or the activities of the government of which the public body is a part;
- (3) if the public body previously has given public notice that this method will be used:
 - (i) by posting or depositing the notice at a convenient public location at or near the place of the session; or
 - (ii) by posting the notice on an Internet website ordinarily used by the public body to provide information to the public; or
- (4) by any other reasonable method.

§ 10-506(c). In interpreting the Act's notice requirement, the test we apply is a reasonable one; that is, does the practice employed result in notice in a manner that

can reasonably be said to reach its intended audience. *Cf.* 2 *OMCB Opinions* 27, 29-30 (1998).

While the complaint focuses on the lead-in language of § 10-506(c)(3), the Act does not specify a particular manner in which a public body must place the public on notice under this provision. In our view, it would be unreasonable to read a particular mechanism into the statute; to do so would be applying form over substance. Thus, our focus is on the ultimate results, whether those interested would be expected to be made aware of a meeting.

The posting of notice on an appropriate website has always satisfied the notice requirements of the Act. *See, e.g.,* 6 *OMCB Opinions* 15, 16 (2008). Chapter 643, Laws of Maryland 2006, was never intended to establish new prerequisites to using an Internet website to inform the public of meetings. Rather, the specific reference to the Internet was simply a recommendation of the Compliance Board to recognize a practice that had become more common. Open Meetings Compliance Board, 14th *Annual Report* pp. 5-6 (October 2006). Furthermore, it was drafted in a manner to recognize that the website employed need not actually be maintained by the public body. For those public bodies that had previously relied on the Internet to provide notice of its meetings, no additional notice was required. SWQAC had long relied on the use of participating agencies' websites and, at some point, established its own website through which notice is also provided. Its failure to formally document its practice following the enactment of the 2007 legislation did not result in a violation of the Act. Furthermore, even if we were to hold that some formal announcement was required, we have previously recognized in another context concerning another public body affiliated with MDE that the information on MDE's online Calendar of Events would have satisfied this requirement. 6 *OMCB Opinions* at 16.⁴

III

February 1 and April 4, 2008 Sessions

The complaint noted that notice of SWQAC's February 1, 2008, meeting was defective in that it was not posted at the "customary" location, *i.e.*, MDE's website. While acknowledging that MDE could not locate a copy of the notice for February 1, the response indicated that proper notice was posted on SWQAC's own website and information about the date and location of the meeting appeared on DNR's website as well.

⁴ The suggestion that SWQAC violated § 10-506(d) by failing to maintain a copy of a notice to the public addressing how it would provide notice under the Act has no merit. This provision requires a public body to maintain a copy of *meeting notices* for at least a year "after the date of the session." It has no other application.

While we were not provided with a copy of the SWQAC's posting for February 1, if the information required under the Act was posted as presented in the response, no violation of the Act's notice requirement occurred. Any member of the public interested in SWQAC's meeting would have likely discovered the information required by the Act had they searched the name of the body on any popular search engine. As noted above, SWQAC has traditionally relied on several websites in advising the public of its meetings. To be sure, the public benefits if notice of a public body's meetings are posted in a consistent manner. It's possible that someone may have been uninformed of the February 1 meeting had they relied solely on MDE's website. Nevertheless, we need not dwell on this matter, since this concern has been effectively eliminated by MDE's decision to provide a link to the SWQAC's website, similar to the practice of DNR.⁵

As to the April 4, 2008, meeting, the complaint noted that MDE's website lacked notice information required by the Act. However, given that complete information was posted on the SWQAC's own website for the April 4 meeting, the notice requirements of the Act were satisfied and no violation of the Act occurred.⁶

IV

Conclusion

In summary, we find that SWQAC has not violated the Open Meetings Act in its reliance on the Internet to inform the public of its meetings. Because complete information was apparently available on the SWQAC's own website, the lack of certain information on MDE's website for two meetings specifically addressed in the complaint did not result in a violation of the Act.

OPEN MEETINGS COMPLIANCE BOARD

Elizabeth L. Nilson
Courtney J. McKeldin
Tyler G. Webb

⁵ In cases where meeting notices are posted on a public body's website as well as websites of other agencies, perhaps the best practice would be to ensure that the public body's website is kept current and that other websites direct the viewer to the public body's website for the most recent information pertaining to a scheduled meeting, accompanied by the appropriate hyperlink.

⁶ Because we find no violation of the Act's notice requirements, we need not address the allegation the SWQAC also violated §§ 10-505 and 10-507(a). However, we note that not every notice deficiency translates into a violation of the Act's open meeting requirements. *See 4 OMCB Opinions* 178, 181 (2005).